United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6004

- - - - - - - - - - - - - - - - - - -

JOSEPH W. DI SILVESTRO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

- - - - - - - - - - - - - - - - - - -

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

B

BRIEF FOR APPELLANT

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether in view of sections 705, 211(a) U.S.C.38 be declared unconstitutional, which deprives and prohibits the courts of jurisdiction to review unlawful acts of the Veterans Administration an agency of the appellee, that held itself out as a criminal court and punished appellant for [illegible]me, without a jury under section 3503 U.S.C. [illegible], a criminal statute. 1/

STATEMENT OF CASE

Nature of the Case

Appellant sought a declaratory judgment and in[illegible]nctive relief for violation of his constitutional guarantees for judicial review pursuant the provisions of the Administrative Procedure Act, 5 U.S.C. section 701 et seq. On November 26, 1976 the lower court dismissed the complaint. (App. 1-4) (R. 1, R. 4). 1/ APPELLANT'S LAWFUL RIGHT TO V.A. MONETARY AND HOSPITALIZATION COMPENSATION FOR HIS WAR SERVICE-CONNECTED DISABILITY WERE FORFEITED AS A PUNISHMENT, FOR A ~~[illegible]~~ CRIME THAT DID NOT EXIST.

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Further, the lower court erred in failing to review agency action that diminished appellant's constitional guarantee under the violations mentioned herein. The Administrative Procedure Act sec. 12 holds, to wit:

> "Nothing in this act shall be held to diminish the constitutional right of any person."

Further, in context of the lower court's decision, to wit:

> " ... plaintiff's medical records pertaining to the alleged psychological medical records had been falsified. (App. 2) (THIS is PREJUDICAL)

VIOLATES THE SIXTH AMENDMENT, FIFTH AMENDMENT.

The lower court had knowledge of the fact that there exist MEDICAL CONCLUSIVE EXCULPATORY/EVIDENCE THAT WOULD EXCLUDE such said criminal allegation . In fact the lower court in an unrelated case found and held in Di Silvestro V. United states of America, to wit: (in re to 3503 U.S.C. 38)

> "In summary, the court holds that the V.A.'s determination of plaintiff's capacity to form the requisite fraudlent intent was not supported by substantial evidence".(Judge Jacob Mishler U.S.D.J. for the EDof NY. 62 -C-713) 62-c-713)

Further, in context of the lower court's decision, to wit:

> " . . . seeking restoration of his pension and other benefits". ((App. 2)

It is stressed with emphasis, that the action before t lower court was for declaratory and injunctive relief as indicated in the STATEMENT OF THE ISSUE PRESENTED FOR REVIEW supra, before this Honorable Court. Further, appellant seek no pension or ~~gratuitous~~ gratuitous pension, the cases relied upon by the appellee and the lower courts have no bearing in the case at bar and are without merit because- a pension for CONNECTED disability under veterans' law are for NON-SERVICE disabilit and COMPENSATION is remuneration for a SERVICE-CONNECTED Disability. See 700 U.S.C.A. 38. 701, 706

11 (A) APPELLANT HAS AN ALREADY ADJUDICATED AWARD TO V.A. PENSION. (B) APPELLANT HAS AN ALREADY V.A. ADJUDICATED TOTAL SERVICE-CONNECTED DISABILITY. (APP. 5, 6, 7).

Undisputed facts

1. The undisputed facts in the court below are (a) appellant has a total war service-connected neurotic disability; (b) appellee's VA agency punished appellant under sec. 3503 U.S.C. 38 a criminal statute, whereunder appellant was prosecuted by agency trial without the due process that demands "THE TRIAL OF CRIMES ... SHALL BE BY JURY". Art. III, ~~xxxxxx~~ sec. 2, CONST. OF U.S. (R. 1) (APP. 5, 6, 7)

Statement of Fact and Argument

The issue presented before this Honorable court has not been res judicata or resolved since 1949 and to-date. Appellant will continue[1] to seek the protection of his constitutional guarantees to the due process of law that have been violated by appellee's VA agency in depriving appellant said guarantees under the FIRST, FIFTH, SIXTH, EIGHT, FOURTEENTH and ARTICLE III, sec. 2 of the Constitution of the United States, and his entitlement to Compensation for his war service-connected disability which is mandatory under law pursuant to Title I, sections 1 and 6, Pub. 2, 73rd Congress. Further, sections 705, 211 (a) U.S.C. 38 which has continued to deprive the appellant of the LIBERTY under the Due Process of the constitutional guarantees mentioned supra cannot be circumvented or continue to deprive appellant the LIBERTY to resort to the courts for a grievance as presented in the issues before this Honorable Court.

[1] THE VA. IS UNLAWFULLY WITHHOLDING TO DATE SUCH MANDATORY COMPENSATION AS A PUNISHMENT FOR AN ALLEGED CRIME — SUCH ALLEGATION HAS PREJUDICED APPELLANT'S CONSTITUTIONAL GUARANTEES IN THE V.A. AND THE COURT BELOW.

Further in respect to Compensation, is neither a non-contractual benefit or gratuity but a LEGAL MANDATE by act of Congress by law under sections 1 and 6 , Title I, Pub. 2, 73rd Congress , for monetary and hospitalization for war service-connected disability. The evidence of record (R.) discloses/has appellant a war service connected neurotic disability. Indeed, the constitutional violations by forfeiting appellant's legal right under Pub. 2, above mentioned as a punishment invoked by the appellee's VA agency under 3503 U.S.C. 38 was cruel and unwarranted. (APP. 5 TO 7) 1/

It is stressed with emphasis that the prohibition of the Federal Courts and the Supreme Court of the United States, in a case such as at bar, is repugnant in the cycle of the first magnitude and a grave transgression of the Constitution of the United States. Moreover, the doctrine of res judicata cannot obtain under the no-review clause of 705, 211 (a) U.S.C. 38 in the case at bar, should be declared unconstitutional, and in an unrelated case in reference to the no-review clause it is most appropriate to quote the following:

> " Where the Government relies on the "no-review clause" to support its own claim, the evil which might result are more obvious, for the Government is at once plaintiff and judge. Indeed, it has been suggested that the Government's creation for itself of an unsailable cause of action on the merits "... is clearly repugnant to fundamental notions of fair play and to our concept of this nation as one of free men having rights against their government ...". (Jacob Mishler, USDJ, EDNY in 62-C-713, Di Silvestre vs United States of America.)

1/ SEE UNDISPUTED FACTS - PAGE 2, SUPRA.

In conclusion, the courts should no longer remain silent. Errors are mistakes that should be corrected. Here, the prohibition of the liberty to resort to the courts under the circumstances of the ISSUE PRESENTED IN THE case at bar is a grave violation of the due process of law.

WHEREFORE, it is prayed that the decision and order of the lower court be reversed and vacated, and remanded to the lower court with the views of this Honorable Court; and for such other and further relief to meet the exigenci in the premises. (R.4)

Respectfully submitted

JOSEPH W. DI SILVESTRO
Attorney pro se
41-11 12th Street
Long Island City, N. Y.
11101

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -x

JOSEPH DI SILVESTRO,

Plaintiff,

- against -

U. S. VETERANS' ADMINISTRATION,

Defendant.

- - - - - - - - - - - - - - - - - - -x

No. 76-C-1167

Memorandum of Decision and Order

November 26, 1976

MISHLER, CH. J.

Plaintiff seeks relief under the Declaratory Judgment Act, 28 U.S.C. §2201 et seq. and under the Administrative Procedure Act, 5 U.S.C. §701 et seq. He asks the court to vacate a forfeiture of his veterans' benefits declared against him by the Veterans' Administration pursuant to 38 U.S.C. §3503, and to declare unconstitutional 38 U.S.C. §211(a), which bars review by federal courts of most decisions of the Veterans' Administration "on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans. . . ."

Plaintiff, a veteran of World War II, is no stranger to the federal court. Since 1949 he has commenced eleven

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unsuccessful actions against the Federal Government. The first series of suits dealt with plaintiff's claim for service-connected psychological disability benefits. See 81 F.Supp. 844 (E.D.N.Y.), aff'd 173 F.2d 933 (2d Cir. 1949); 9 F.R.D. 435 (E.D.N.Y. 1949); 10 F.R.D. 20 (E.D.N.Y.), aff'd 181 F.2 502 (2d Cir.), cert. denied 339 U.S. 989, 70 S.Ct. 1014 (1950); DiSilvestro v. Gray, 194 F.2d 355 (D.C. Cir.), cert. denied 343 U.S. 930, 72 S.Ct. 1043 (1952).

The facts leading to the present cause of action arose when the Veterans' Administration established that the statements in plaintiff's medical records pertaining to his alleged psychological disability had been falsified. Accordingly, the Committee on Waivers and Forfeitures declared, pursuant to 38 U.S.C. §3503, that plaintiff had forfeited his rights to veterans benefits and that any benefits inuring to him were cancelled, with the exception of his insurance.

Plaintiff responded to this ruling with a series of actions seeking restoration of his pension and other benefits. In DiSilvestro v. United States Veterans' Administration, 132 F.Supp. 692 (E.D.N.Y. 1955), aff'd 228 F.2d 516 (2d Cir.), cert. denied 350 U.S. 1009, 76 S.Ct. 784 (1956), the court held that his action was barred by the "no-review" clause of 38 U.S.C. §705 (1952) as amended, 38 U.S.C. §211(a) (Supp. I,

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1965). A subsequent action for a declaratory judgment that the Board's decision was unlawful again was dismissed on the basis of the "no-review" clause of §211(a). 151 F.Supp. 337 (E.D.N.Y. 1957), application to proceed in forma pauperis denied without opinion, Civ. A. No. 17322 (2d Cir. Nov. 1958), cert. de .a 355 U.S. 968, 78 S.Ct. 550 (1958). In 1960, plaintiff's attempt to raise the same issues in a suit commenced under the Federal Tort Claims Act again wa. dismissed for the same reason. 181 F.Supp. 860 (E.D.N.Y.), aff'd without opinion (2d Cir.), cert. denied 364 U.S. 825, 81 S.Ct. 65 (1960).

The first claim in the present action again raises the question of the validity of the forfeiture. This issue has been before a number of courts directly on at least three previous occasions and peripherally in many other suits. As noted, these courts determined that subject matter jurisdiction did not exist with respect to plaintiff's claims because of the "no-review" provision of 38 U.S.C. §211(a). Therefore, since the facts underlying plaintiff's case are the same as those presented by him in the earlier actions, it is clear that the claim challenging the forfeiture is barred by the doctrine of res judicata.

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Plaintiff's second claim, which challenges the constitutionality of §211(a), is without merit. It was within the legislative prerogatives of Congress to bar judicial review of determinations of the Veterans' Administration on claims for non-contractual benefits. Rodulfa v. U.S., 461 F.2d 1240 (D.C. Cir.), cert. denied 409 U.S. 949, 93 S.Ct. 270 (1972); Milliken v. Gleason, 332 F.2d 122, cert. denied 379 U.S. 1002, 85 S.Ct. 723 (1965). Moreover, it has been held that this provision does not deprive citizens of due process of law. Sager v. Johnson, 342 F.Supp. 351 (D.C. Md. 1972).

For the reasons stated above, plaintiff's complaint is dismissed and it is

SO ORDERED.

The Clerk is directed to enter judgment in favor of defendant and against plaintiff dismissing the complaint.

U. S. D. J.

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CO:BERMAN
File #C22510

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

JOSEPH W. DI SILVESTRO,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.

----------X

PRELIMINARY PRE-TRIAL STIPULATION

Civil Action No. 62-C-713

JOSEPH W. DI SILVESTRO, plaintiff pro se, and BERNARD ROTHMAN, Assistant United States Attorney for the Eastern District of New York, having met pursuant to the order for pre-trial conference, do hereby enter into the following statement:

I. Undisputed Facts

Joseph W. DiSilvestro, a veteran of the United States Army during World War II, was issued National Service Life Insurance Policy No. V-235-78-42 on April 8, 1951, in the face amount of $10,000. Upon application, the Disability Insurance Claims Division of the Veterans Administration rendered a decision holding that plaintiff was totally disabled and that, effective April 8, 1952, he was entitled to a waiver of premium. The disability upon which the waiver was based was a service-connected neurotic condition.

By decision of the then Central Committee on Waivers and Forfeitures during 1954, plaintiff's entitlement to compensation benefits was forfeited. This decision was affirmed on appeal by the Board of Veterans Appeals. The forfeiture was made pursuant to 38 U.S.C. 5715, 1952 Edition, presently, 38 U.S.C. §3503(a). Pursuant to 38 U.S.C. Chapter 12(a), now, 38 U.S.C. §3012, the . . .

DATED: BROOKLYN, NEW YORK
SEPT. 27, 1965

31a

EXHIBIT "A"

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Veterans Administration
New York Regional Office
252 Seventh Avenue
New York New York

Re: Di Silvestro, Joseph W.
C 4780918

ATT: Adjudication Division

June 9, 1953

Gentlemen:

The following is submitted for your record, in behalf of my patient Joseph W. Di Silvestro, veteran, 41-11-12th Street, Long Island City, New York, for consideration of his disability claim.

On December 27, 1944, shortly from discharge from military service in World War II, the veteran consulted me for symptoms due to extreme state of nervousness. Even though I am not a Psychiatrist, I gave him the usual help and medication and referred him to the V.A.. It was not until the full facilities of the VA's rehabilitation, neuro-psychiatric and curative shop divisions were made available to the veteran that he ceased to receive medical treatments by me for the nervous condition. Since April 6, 1953, the veteran has resumed treatment for the said basic symptoms manifesting the nervous condition that existed on December 27, 1944, except that the manifestations are presently in a more serious state. Your records will show, that I established the nervous condition as a neurosis existing in and aggravated as the result of the veteran's military service, and now the said neurosis is held to be under the VA's Neuro-psychiatric division as Schizphrenic, Paranoid, since July 12, 1950.

Now in view of the change of the diagnosis established by your Psychiatric division, my prior diagnosis of psychoneurosis, manifested by symptoms of pains in the head, chest and heart regions, loss of sleep and anxiety state, are no longer to be analyzed as psychoneurosis, but

EXHIBIT "A"

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a phase of psychoses to have existed in and aggravated as the result of the vetetans military service in World War II. I have considered also the Veterans Administration's Branch Office 8 letter, dated October 8, 1948, holding veteran medically ineligible for reemployment and the VA's Neuro-psychiatric division letter dated May 12, 1953 holding the veteran totally disabled from July 12, 1950.

In view of the above, it is imperative that neuro-psychiatric treatments should be continued under your jurisdiction. My present findings and diagnosis, confirms the Neuro-psychiatric division's diagnosis of Schizophrenic, Paranoia.

Authprization, attached.

Very truly yours,

/s/ Harry G. Golan, M.D., F.A.C.P.

HGG:abs

c o p y

EXHIBIT "B"

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